RENDERED: JANUARY 3, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000433-MR

DAN ROSS APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 07-CI-05225

UNIVERSITY OF KENTUCKY,
AND JOSEPH REED APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, MAZE AND VANMETER, JUDGES.

CAPERTON, JUDGE: Dan Ross appeals from the grant of summary judgment in favor of Appellees, the University of Kentucky and Joseph Reed, dismissing all of his claims against the Appellees, including those alleging violation of the whistleblower statute Kentucky Revised Statutes ("KRS") 61.102 and intentional infliction of emotional distress ("IIED"). After our review of the record, the

parties' arguments, and the applicable law, we affirm in part the trial court's grant of summary judgment regarding the violation of the whistleblower statute and individual liability claims; we also agree with Appellees that the trial court properly granted summary judgment on Ross's claim of IIED. However, we must conclude that summary judgment was not appropriate for the remaining claims regarding violation of the whistleblower statute, given the factual matters contested. Accordingly, we affirm in part, reverse in part and remand this matter for further proceedings.

We shall briefly summarize the parties' voluminous factual accounts.[1] This litigation is due to Ross's employment for Appellee University of Kentucky (hereinafter "UK") as an internal auditor in UK's Internal Audit Department ("UKIA").[2] At the time of his termination of August 24, 2007, Ross held the position of Audit Manager, with three auditors reporting to him. Ross reported directly to the UKIA Director, Appellee Joseph Reed. Reed reported directly to Executive Vice President for Finance and Administration, Frank Butler. Reed also reported to the Audit Subcommittee of UK's Board of Trustees.

Ross claimed that he and Reed had a good working relationship until Ross became concerned about the UK's credit cards, which were called

---

[1] Appellees' factual counterstatement is 20 pages long and Ross's factual statement is 18 pages long.

[2] Ross was also an adjunct professor in Accounting. Ross alleges that while working at UKIA, he possessed greater professional certifications than his supervisors. Ross is certified as a Certified Internal Auditor, a Certified Management Accountant, and a licensed Certified Public Accountant.

"procurement cards" or "pro-cards." In auditing the use of UK pro-cards, Ross discovered that some departments were not following UK's business processes and he made some recommendations about improving those processes.[3] Ross alleged that he saw repeated problems with the use of pro-cards in subsequent audits so he concluded that nobody was doing anything meaningful to address the issues.[4] Ross was aware that UK's Treasurer and Controller had agreed to accept his recommendations but he had no knowledge of how they addressed these recommendations.

UKIA also audited the Research Challenge Trust Fund ("RCTF"), in which Ross was involved. The RCTF provided state matching funds for any financial donations to UK by "unaffiliated corporations." One of the donors to UK for which state matching funds were requested was Kentucky Medical Services Foundation ("KMSF"). UK's consolidated financial statements for 2004-2006 listed KMSF as an affiliated corporation of UK. The lead auditor, Martin Anibaba, and Ross contacted Angie Martin, the Associate Vice President for Budgeting at UK to look into the matter. Martin informed them that KMSF was a nonaffiliated corporation and thus was eligible to make donations under the RCTF program. Ross recognized the conflict between the financial statements and the information from Barbara Jones, the General Counsel for the University. According to UK,

[3] The problem appears not to have been that UK had insufficient procedures but that certain departments were not following said procedures.

[4] Ross also claimed to have an ethical issue with the investigation of Auxiliary Services, based on what he heard, and thought it involved abuse of a pro-card. At his deposition, he conceded that there was no data from which he could draw that conclusion.

Jones later tried to clarify this conflicting information. Ross pushed to have the final RCTF audit report state that KMSF's donations were ineligible for state matching due to KMSF being an affiliated corporation. Martin, the lead auditor, did report the inconsistent information to her superiors. At the time Ross left UKIA, the report was not final.

UKIA also conducted an audit of UK checking accounts and the lead auditor was Karen Michaels. This was a follow-up audit to a previous investigation regarding unauthorized checking accounts that had been handled by another auditor, Lisa Watkins, in which she had sent letters to local banks inquiring whether those banks had open accounts in UK's name and 57 unauthorized accounts were discovered. After Reed met with UK's Treasurer, Reed informed Ross that he was not going to send out letters to banks statewide to look into unauthorized checking accounts. Thereafter, in February 2007, Ross told Reed that he did not think Reed was doing his job, that UKIA was becoming a farce, and that he could not continue to work in UKIA under such conditions.

Ross threatened to take his concerns to Butler; thereupon Reed told Ross that Butler supported him. According to UK, the following day, Ross told Reed that he had reconsidered going to Butler and instead wanted to transition out of UKIA. Ross wanted Reed to help him find a job opportunity outside of UKIA. In response, Reed agreed that it was time for Ross to pursue other work. In March of 2007, Reed proposed an August 31, 2007, date for Ross to transition out of UKIA and Ross raised no objection to that date.

Ross claimed that after he threatened Reed with going to Butler, Reed began to retaliate against him. Ross claimed that people in the office started to avoid him. Ross claimed that a meeting with another auditor, which should have taken five minutes, took two hours. Ross sent Reed an e-mail expressing frustration with his job. Reed suggested Ross work from home. Ross began working from home in March 2007, and was not required to come into the office for regular staff meetings. Ross communicated infrequently with Reed and the staff during this time. On June 14, 2007, Reed sent Ross an e-mail telling him that he had spoken with KMSF on Ross's behalf and that an offer of employment seemed likely. Ross responded that he was distracted with a medical issue in his family and that he would be in the office over the weekend to update his time sheets and would keep Reed informed. Instead, Ross came into the office and copied documents with which he claimed to have concerns.

After Reed asked Ross for documentation of his intention to leave UKIA, Ross called Butler to tell him he wanted to talk to him about some issues he had with Reed and Butler informed him to forward his complaint in an e-mail. On June 21, 2007, Ross sent Butler an e-mail in which he claimed ethical concerns, among which were pro-card abuses and deficiencies in final audit reports for Auxiliary Services, RCTF, and the UK checking accounts. He told Butler that he had expressed these concerns to Reed and that Reed had made him work from home. He stated that Reed had criticized him to the staff and some of them started avoiding him. He thought Reed was interfering with his job prospects. Ross

admitted that he sent the e-mail to Butler because Reed asked for a letter of resignation from Ross and because Ross wanted to get his complaints filed with Butler while he was still an employee. Ross said that if Reed had not requested his letter of resignation he would still have probably gone to Butler but at a different time.

After the June 21, 2007, e-mail to Butler, Reed made Ross come back into the office to work. Ross believed that Reed was retaliating against him; Reed contends that he was following the advice he had received from UK's Human Resources. After notifying[5] Butler of Ross's return to work, Ross met with Mary Ferlan, the Director of UK's Human Resources, at the behest of Butler to assist in his job search. Ferlan informed Ross that it was not Reed's responsibility to find him another job and that it was in his best interests to stop voicing his opinions about UKIA.

By August, Ross had not secured another job and "felt like the clock was ticking." On August 9, Ross sent out another e-mail regarding his ethical concerns that he had previously addressed to Butler in June. This August 9 e-mail was sent to members of UK's senior management including members of the Internal Audit Sub-Committee; Butler; Terry Allen; Kim Wilson; Sherri Murphy; Mary Ferlan; Doug Boyd; several employees of CPE; Crit Luallen, the State Auditor; Janet Cantrell, who worked in the State Auditor's Department; multiple

[5] There was also a July 10, 2007, e-mail from Ross to Butler wherein Ross alleged that Reed was retaliating against him by turning the UKIA staff against him. The matter was passed along to Terry Allen, the Vice President for Equal Employment Opportunity. Allen found nothing discriminatory.

elected Representatives from Clark and Fayette Counties; and the GAO. Ross was suspended on August 10, 2009, pending an investigation into whether he was guilty of insubordination. He was terminated for insubordination on August 31.

Ross brought suit against UK and Reed alleging that both Reed and UK were liable to him per KRS 61.102, the Kentucky Whistleblower Act. Additionally, Ross's complaint alleged wrongful termination in violation of public policy and that Reed and UK were liable to him for intentional infliction of emotional distress ("IIED"). Reed and UK filed a motion for summary judgment. The trial court granted the summary judgment motion and entered an order on February 8, 2011, dismissing all of Ross's claims against Reed and UK.

The trial court's grant of summary judgment was premised upon seven grounds. First, that the Kentucky Whistleblower Act does not impose individual liability on Reed. Second, the wrongful termination claim was preempted by KRS 61.102. Third, there was no evidence to support the claim of IIED. Fourth, that Ross was not entitled to protection under KRS 61.102 as the e-mail communications to Butler on June 21, 2007, and July 10, 2007, and the August 9, 2007, e-mail to the Audit Subcommittee of the Board of Trustees and to the Board of Trustees were a part of his job duties; and that communications which are pursuant to an employee's regular job duties are not entitled to protection. Fifth, Ross was not subjected to adverse employment treatment after his e-mail communication of July 10, 2007, to Butler. Sixth, the August 9, 2007, e-mail which was sent to external sources outside of UK was not protected because the

ethical concerns were not based on a reasonable belief of accuracy, nor did Ross manifest a desire to correct the wrongful activity reported as he delayed reporting the ethical concerns after he discovered them. Seventh and last, Ross had a duty to present his ethical concerns first to the Audit Subcommittee and the Board of Trustees, instead of the contemporaneous disclosure to external sources; Ross violated the rules outlined in the UKIA Administrative Manual which incorporated a confidentiality provision. It is from this grant of summary judgment that Ross now appeals.

Additionally, Ross appeals from the trial court's November 20, 2009, order in which the court granted the Appellees' motion for a protective order prohibiting Ross from obtaining discovery of other entities associated with UK. Ross sought the discovery to prove that KMSF is an affiliated corporation of UK pursuant to KRS Chapter 164A. The court concluded that the discovery sought was not necessary or relevant to fully adjudicate Ross's claims. The court noted that UK agreed to stipulate that the issue originally raised by Ross to Reed about whether KMSF was an affiliated corporation of UK was a legitimate issue for Ross to have raised. The court then quashed the subpoenas and notices of depositions for the various affiliated UK corporations.

On appeal, Ross first argues that the trial court made numerous erroneous findings of fact in granting the summary judgment motion, specifically: (1) the court erred in finding that Ross was not subjected to adverse employment treatment; (2) the court erred in finding that Ross's June 21, 2007, July 10, 2007,

and August 9, 2007 e-mails to Frank Butler and the Board of Trustees were made pursuant to his regular job duties; (3) the court erred in finding that Ross's August 9, 2007, e-mails were not made in good faith and were not protected communications under KRS 61.101; (4) the court erred in finding that Ross failed to offer any evidence that UK's Internal Audit Function was compromised by improper influence; and (5) the court erred in finding that Ross used information acquired in the course of his employment for personal gain.

Ross next argues that the court made multiple erroneous legal rulings, including: (1) the court erred in holding that communications pursuant to an employee's job duties are not entitled to protection per KRS 61.101; (2) court erred in holding that Ross had a duty to present his issues to the Board of Trustees before blowing the whistle; (3) the protections provided by the Whistle Blower Act supersede UK's internal audit administrative manual; (4) court erred in ruling that it would not try the KMSF affiliation issue; (5) Reed should be considered to be an employer liable to Ross under KRS 61.101; and (6) Reed is personally liable of intentional infliction of emotional distress.

The Appellees argue that the trial court correctly determined there were no material issues of fact as to whether UK is liable to Ross pursuant to KRS 61.102. In support thereof, the Appellees assert that: (1) disclosures within an employee's job duties are not covered by KRS 61.102; moreover, Ross's communications were not made in good faith; (2) Reed has no liability under KRS 61.102; (3) there is no evidence that Reed is liable for intentional infliction of

emotion distress; (4) the court did not err in granting Appellees' motion for a protective order regarding KMSF.

We have consolidated the parties' numerous arguments into three issues, namely: (1) whether the court erred in granting summary judgment to Ross's whistleblower claims; (2) whether the court erred in granting summary judgment based on the IIED claim; and (3) whether the court erred in granting Appellees' protective motion. With these issues in mind we turn to our appellate standard of review of this matter.

At the outset we note that the applicable standard of review on appeal of a summary judgment is, "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) 56.03. The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is proper only "where the movant shows that the adverse party could not prevail under any circumstances." *Id.* However, "a party opposing a properly supported

summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." *Hubble v. Johnson,* 841 S.W.2d 169, 171 (Ky. 1992), citing *Steelvest, supra*. *See also O'Bryan v. Cave*, 202 S.W.3d 585, 587 (Ky. 2006); *Hallahan v. The Courier Journal,* 138 S.W.3d 699, 705 (Ky. App. 2004). Since summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*. *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001). With this in mind we now turn to the issues raised by the parties.

First, we must determine whether the court erred in granting summary judgment to Ross's whistleblower claims. The purpose of the Kentucky Whistleblower Act "is to protect employees who possess knowledge of wrongdoing that is concealed or not publicly known, and who step forward to help uncover and disclose that information." *Davidson v. Commonwealth, Dept. of Military Affairs*, 152 S.W.3d 247, 255 (Ky. App.2004), quoting *Meuwissen v. Dep't of Interior*, 234 F.3d 9, 13 (Fed.Cir.2000).[6]

---

[6] Indeed the Kentucky Supreme Court reiterated the purpose of the act espoused in *Davidson:*

> The Whistleblower Act's purpose "is to protect employees who possess knowledge of wrongdoing that is concealed or not publicly known, and who step forward to help uncover and disclose that information." *Davidson v. Commonwealth, Dept. of Military Affairs,* 152 S.W.3d 247, 255 (Ky. App. 2004) (quoting *Meuwissen v. Dep't of Interior*, 234 F.3d 9, 13 (Fed.Cir. 2000)). The Act has a remedial purpose in protecting public employees who disclose wrongdoing. It serves to discourage wrongdoing in government, and to protect those who make it public. The purpose of the Whistleblower Act is clear, and it must be liberally construed to serve

To that effect, KRS 61.102(1) and (2) provide as follows:

> (1) No employer shall subject to reprisal, or directly or indirectly use, or threaten to use, any official authority or influence, in any manner whatsoever, which tends to discourage, restrain, depress, dissuade, deter, prevent, interfere with, coerce, or discriminate against any employee who in good faith reports, discloses, divulges, or otherwise brings to the attention of the Kentucky Legislative Ethics Commission, the Attorney General, the Auditor of Public Accounts, the Executive Branch Ethics Commission, the General Assembly of the Commonwealth of Kentucky or any of its members or employees, the Legislative Research Commission or any of its committees, members or employees, the judiciary or any member or employee of the judiciary, any law enforcement agency or its employees, or any other appropriate body or authority, any facts or information relative to an actual or suspected violation of any law, statute, executive order, administrative regulation, mandate, rule, or ordinance of the United States, the Commonwealth of Kentucky, or any of its political subdivisions, or any facts or information relative to actual or suspected mismanagement, waste, fraud, abuse of authority, or a substantial and specific danger to public health or safety. No employer shall require any employee to give notice prior to making such a report, disclosure, or divulgence.
>
> (2) No employer shall subject to reprisal or discriminate against, or use any official authority or influence to cause reprisal or discrimination by others against, any person who supports, aids, or substantiates any employee who makes public any wrongdoing set forth in subsection (1) of this section.

In order to demonstrate a violation of the Whistleblower Act, a plaintiff must establish the following four elements:

---

that purpose.

Workforce Development Cabinet v. Gaines, 276 S.W.3d 789, 792-93 (Ky. 2008)(footnote omitted).

> (1) the employer is an officer of the state; (2) the employee is employed by the state; (3) the employee made or attempted to make a good faith report or disclosure of a suspected violation of state or local law to an appropriate body or authority; and (4) the employer took action or threatened to take action to discourage the employee from making such a disclosure or to punish the employee for making such a disclosure.

Davidson, 152 S.W.3d at 251. In addition, the plaintiff "must show by a preponderance of evidence that 'the disclosure was a contributing factor in the personnel action.'" *Id.*, quoting KRS 61.103(3). For purposes of a whistleblower action, "disclosure" means "a person acting on his own behalf, or on behalf of another, who reported or is about to report, either verbally or in writing, any matter set forth in KRS 61.102." KRS 61.103(1)(a). "Contributing factor" is defined in KRS 61.103(1)(b) as:

> [A]ny factor which, alone or in connection with other factors, tends to affect in any way the outcome of a decision. It shall be presumed there existed a "contributing factor" if the official taking the action knew or had constructive knowledge of the disclosure and acted within a limited period of time so that a reasonable person would conclude the disclosure was a factor in the personnel action.

"Once a prima facie case of reprisal has been established and disclosure determined to be a contributing factor to the personnel action, the burden of proof shall be on the agency to prove by clear and convincing evidence that the disclosure was not a material fact in the personnel action." KRS 61.103(3).

Sub judice it is clear that Ross's employment relationship with UKIA falls under the purview of KRS 61.102. *See* KRS 61.101(1) and (2). Our review of the

record also shows that UKIA terminated Ross's employment relationship after the August e-mails.[7] Thus, what is truly in contention is whether Ross made or attempted to make a good faith report or disclosure of a suspected violation of law to an appropriate body or authority.

In *Thornton v. Office of Fayette County Attorney*, 292 S.W.3d 324, 331 (Ky. App. 2009), this Court addressed the issue of good faith:

> To show that good faith was used in making a report, it is incumbent upon the employee to demonstrate that the report was based on a reasonable belief of accuracy. Further, considering the public policy purposes of the whistleblower statute, the employer must manifest some desire to correct the wrongful activity reported. Surely, it is not good faith to make a report, particularly one based on second-hand knowledge, for a corrupt motive like malice, spite, or personal gain.
> In order to determine whether a report of a violation or suspected violation of law is made in good faith, we must look not only at the content of the report, but also at the reporter's activities in making the report.

Ultimately, we believe the question of whether Ross made a "good faith" disclosure to be a close one and consequently conclude that it should not have been resolved via summary judgment. In reaching this conclusion, we note that as a general rule, a determination of whether a party acted in good faith is a question of fact that does not lend itself well to summary judgment. *Cf. Rowan County v. Sloas*, 201 S.W.3d 469, 474 (Ky. 2006). In light of the significant factual assertions made by each of the parties *sub judice*, we believe that this matter

[7] We disagree with the trial court below that there was no evidence that Ross encountered punishment or was discouraged from making a report after he informed Butler and Reed of his ethical concerns. We believe this matter to be a factual finding for the finder of fact and the record shows that this matter was contested by the parties, precluding summary judgment.

should not have been resolved via summary judgment and its resolution in that manner necessitates reversal; i.e., there are genuine issues as to material facts, like good faith, in dispute.

We also disagree with the trial court's conclusion that Ross was required to disclose first to UK prior to or contemporaneous with disclosures to external sources, namely, state officials and their employees. The Kentucky Supreme Court addressed "any other appropriate body or authority internal" and concluded that internal disclosure per the Act was permissible:

> We believe that "any other appropriate body or authority" should be read to include any public body or authority with the power to remedy or report the perceived misconduct. This interpretation serves the goals of liberally construing the Whistleblower Act in favor of its remedial purpose, and of giving words their plain meaning. Generally, the most obvious public body with the power to remedy perceived misconduct is the employee's own agency (or the larger department or cabinet).

Workforce Development Cabinet v. Gaines, 276 S.W.3d at 793.

In light of *Gaines* and KRS 61.102, the trial court incorrectly concluded that Ross was required to first internally report by the UKIA manual and thus, his August e-mails could not constitute a disclosure. Moreover, per *Gaines,* Ross's internal e-mails could constitute a disclosure, provided it was made in good faith.[8] Thus, the trial court erred in granting summary judgment on Ross's whistleblower

[8] We also disagree with the trial court's conclusion that, as a matter of law, any report or disclosure made per one's job duty never qualifies under KRS 61.102. At this time, we decline to further address this nuance because it is not determinative of the issues raised on appeal.

claims, excluding those of individual liability discussed *infra*, necessitating reversal.

Turning to the issue of individual liability of Reed under the Act, we agree with Appellees that the trial court correctly concluded that the Act does not provide for individual liability and, thus, we find no error in the grant of summary judgment solely on this ground. *See Cabinet for Families and Children v. Cummings*, 163 S.W.3d 425, 431 (Ky. 2005)("Court's conclusion that the Legislature did not intend for policy makers and managers to be individually liable under the Act."). We affirm the trial court's determination that Reed was not individually liable under the Act.

Turning to the second issue before us, whether the court erred in granting summary judgment based on the IIED claim, we must agree with Appellees that the court did not err in granting summary judgment on this ground.

This Court, in *Wilson v. Lowe's Home Center*, 75 S.W.3d 229 (Ky. App. 2001), addressed the tort of IIED and noted:

> The tort of IIED was first recognized by the Kentucky Supreme Court when it adopted the Restatement (Second) of Torts, § 46 in *Craft v. Rice*, Ky., 671 S.W.2d 247, 251 (1984). The court adopted the following:
>
> **§ 46. Outrageous Conduct Causing Severe Emotional Distress**
>
> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such

> emotional distress, and if bodily harm to the other results from it, for such bodily harm.
>
> *Id.* In *Kroger Co. v. Willgruber*, Ky., 920 S.W.2d 61 (1996), the Kentucky Supreme Court stated that "[c]itizens in our society are expected to withstand petty insults, unkind words and minor indignities. Such irritations are a part of normal, every day [sic] life and constitute no legal cause of action. It is only outrageous and intolerable conduct which is covered by this tort." *Id*. at 65.

Wilson at 237.

In the case *sub judice*, the facts alleged by Ross concerning his employment with UKIA simply do not rise to the level of outrageous conduct required by *Wilson*. Moreover, "The mere termination of employment and the resulting embarrassment do not rise to the level of outrageous conduct and resulting severe emotional distress necessary to support a claim for IIED." *Miracle v. Bell County Emergency Medical Services*, 237 S.W.3d 555, 560 (Ky. App. 2007). Accordingly, the trial court did not err in granting summary judgment on Ross's IIED claims.

Last, we must determine whether the court erred in granting Appellees' protective motion. Ross urges this Court to reverse the trial court's discovery order as whether KMSF was an affiliated corporation with UK would prove that UK had violated the law and provide evidentiary support for his whistleblower claim. We disagree.

In establishing a whistleblower claim, a suspected violation of law is sufficient if the other criteria are met. *See Davidson,* 152 S.W.3d at 251. Thus,

whether KMSF is actually an affiliated corporation of UK pursuant to KRS Chapter 164A is not necessary to fully adjudicate Ross's claims. It would be for the jury to decide this matter as discussed *supra.* We likewise agree with the trial court that UK's agreed stipulation that the issue originally raised by Ross to Reed about whether KMSF was an affiliated corporation of UK was a legitimate issue for Ross to have raised and effectively removes the need for cumbersome discovery of UK's other affiliated corporations. Finding no error with the protective order, we affirm.

In light of the aforementioned, we affirm in part, reverse in part, and remand this matter for further proceedings.

MAZE, JUDGE, CONCURS WITH SEPARATE OPINION.

MAZE, JUDGE, CONCURRING: I fully agree with the majority's reasoning and the result, but I write separately to raise an additional point. Based upon interpretations of the Federal Whistleblower Protection Act, 5 United States Code (U.S.C.) § 2302(b)(8), the University of Kentucky argued, and the trial court agreed, that speech which is related to an employee's job duties and is directed within the employee's chain of command is not protected. (Citing *Davis v. McKinney*, 518 F.3d 304, 315 (5th Cir. 2008), *Sasse v. United States Dept. of Labor*, 409 F.3d 773, 779 -780 (6th Cir. 2005), and *Willis v. Department of Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998). Consequently, the trial court in this case concluded that Ross's June 21 and July 10 communications to Frank Butler were not within the protection of Kentucky's Whistleblower Protection Act, KRS

61.102. I agree with the majority that Ross's July reports to Butler may fall within the protection of the Kentucky Act. But while this question is not entirely determinative of the issues presented on appeal, I believe that it should be addressed further because it is likely to affect the scope of the issues presented to the trial court upon remand.

Although the Federal authority cited by the University is relevant to our interpretation of Kentucky's Whistleblower Protection Act, I believe that it is distinguishable and is not controlling in this case.[9] Moreover, I strongly believe that the University's interpretation of this Federal authority this interpretation is inconsistent with the broad purposes of Kentucky's Whistleblower Protection Act. Discussion and even disagreement with supervisors over job-related activities is a normal part of most occupations and, when taken alone, generally is not protected activity. *Willis*, 141 F.3d at 1143. However, the purpose of Kentucky's Act is to protect employees who possess knowledge of wrongdoing that is concealed or not publicly known, and who step forward to help uncover and disclose that information. *Workforce Development Cabinet v. Gaines*, 276 S.W.3d at 792. "The Act has a remedial purpose in protecting public employees who disclose wrongdoing. It serves to discourage wrongdoing in government, and to protect

[9] Indeed, there is contrary authority holding that disclosures made as part of an employee's duties may be protected under the Federal Whistleblower Protection Act. *See Watson v. Department of Justice*, 64 F.3d 1524, 1530 (Fed. Cir. 1995), and *Marano v. Department of Justice*, 2 F.3d 1137, 1142 (Fed. Cir. 1993). *Willis* and *Sasse* each involved fairly narrow factual exceptions to that rule, and there were other controlling factors. *Davis v. McKinney*, *supra*, was not brought under the Federal Whistleblower Act, but was a claim for violation of civil rights under 42 U.S.C § 1983.

those who make it public." *Id.* at 793. That protection would be of limited value if it does not cover employees who disclose wrongdoing within the scope of his or her official duties.

In this case, Ross alleges that he twice attempted to raise his concerns about financial misconduct to his superiors. Ross contends that he made the August disclosure outside of his normal chain of authority because his prior reports had been met with resistance and retaliation. As the majority correctly notes, there are factual questions about whether he acted reasonably and in good faith, and whether his supervisors retaliated against him for making these reports. But for purposes of this appeal, I would expressly hold that Ross's July reports are protected activity and are actionable under the Kentucky Whistleblower Protection Act.

VANMETER, JUDGE, DISSENTS AND WILL NOT FILE SEPARATE OPINION.

BRIEFS FOR APPELLANT:

William C. Rambicure
Lexington, Kentucky

Christopher B. Rambicure
Louisville, Kentucky

BRIEF FOR APPELLEES:

Barbara Kriz
Lexington, Kentucky